

2 Indigent defense in the U.S.

3 *Box: The View from the Courtroom*

4 Texas requirements and practices

7 Issues in the debate

8 Issue 1:
Appointment process

9 Issue 2:
Competency of
appointed attorneys

11 Issue 3:
Compensation of
appointed attorneys

11 Issue 4:
Timely appointments

The Best Defense: Representing Indigent Criminal Defendants

The Sixth Amendment to the U.S. Constitution guarantees that defendants in criminal prosecutions have legal assistance for their defense. The U.S. Supreme Court has held, in a series of cases that includes *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), that due process requires states to provide legal counsel for indigent people charged with felonies or misdemeanors that involve possible imprisonment. Supreme Court Justice Hugo Black wrote in *Gideon* that “. . . in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,” and that in the U.S., the defendant’s right to counsel is fundamental and essential to a fair trial.

Texas statutes echo the federal guarantees by requiring courts to appoint attorneys for indigent defendants charged with crimes that are punishable by imprisonment. Also, the Texas Constitution’s Bill of Rights, Art. 1, sec. 10, gives a defendant the right “of being heard by himself or counsel, or both.” Some analysts estimate that at least half of criminal defendants in Texas, and possibly as many as three-quarters, are indigent and use lawyers provided for them.

In most Texas counties, judges appoint attorneys for indigent defendants and decide how much each lawyer will be paid. However, the statutes authorize a few jurisdictions to create public defender offices. The counties pay the entire cost of indigent defense, except that the state provides funds for certain appeals of death penalty cases.

Critics of Texas’ system of providing legal counsel for indigent defendants say that the appointment process can present a conflict of interest for judges and defense attorneys; that defendants are not guaranteed competent attorneys; that compensation for appointed attorneys can be too

Debate over how Texas provides counsel for indigent defendants centers on the process of appointing attorneys, their competency and payment, and timeliness.

low; and that appointments are not always made in a timely fashion.

Supporters of the system counter that it works well and allows localities to devise systems that work for their unique circumstances. Since judges are elected to oversee the justice system, they are, in most cases, the appropriate authority to oversee and run the appointment system because they have an interest in the timely appointment of competent attorneys who are compensated adequately, supporters say.

Proposals to change the current system include changing the appointment process, instituting minimum education or experience requirements for attorneys, establishing statewide standards for payment of attorneys, and setting a statewide deadline for appointing attorneys. In 1999, the 76th Legislature approved revisions to the current system in [SB 247 by Ellis](#), but Governor Bush vetoed the bill.

This report examines Texas' indigent defense system and proposals to change the system. There has been no systematic study of Texas practices, which can differ from county to county and from court to court. No reliable numbers exist to compare the amount spent per jurisdiction or the outcome of cases in different jurisdictions. Also, opinions differ on how to measure whether a system is providing an adequate defense for indigent defendants.

Indigent defense in the U.S.

Most states provide lawyers for indigent defendants by assigning and paying private attorneys to handle the cases, by contracting with attorneys or firms to handle the cases, or through public defender systems. Some states use a combination of these three models. Most systems also have an alternate method for appointing lawyers for cases in which a lawyer assigned through the system has a conflict of interest.

Some of the most recent information about states' indigent defense systems appears in "Indigent Defense Systems in the United States" by Robert L. Spangenberg and Marea L. Beeman, published in the Winter 1995 edition of the Duke University law school's *Journal of Law and Contemporary Problems*, and an October 1998 update of that article. The U.S. Bureau of Justice Services last published a comprehensive survey of states' criminal

defense systems in 1986 and 1988, but began working on an update study in 1997. Texas Appleseed, a nonprofit organization that works with attorneys and civic leaders to study public policy issues, plans to collect and analyze data on Texas counties' indigent defense systems over the next year and have a report on the issue by late 2000.

Private attorneys can be assigned for indigent defense cases under a formal system that uses certain rules or rotation to decide who is appointed, or else informally without guidelines. Jurisdictions that appoint counsel most often use the informal, ad-hoc system, according to Spangenberg and Beeman.

Some states use oversight bodies to coordinate the assignment of attorneys for indigent defendants. These bodies or commissions sometimes set minimum qualifications or coordinate training for appointed counsel. Some distribute funds to local programs that follow the policies set by the oversight bodies.

Alternatively, the governing body may enter into a contract with individual lawyers, law firms, or bar associations to represent indigent defendants. Attorneys can be under contract either to handle all indigent cases for a fixed price or to be paid a fixed price per case.

Public defender programs usually are public or nonprofit private organizations that hire attorneys to provide all indigent representation for a specific jurisdiction.

Indigent defense systems can be organized on a statewide basis or by counties, regions, or other entities. According to Spangenberg and Beeman, 16 states have established statewide public defender offices to represent inmates at trial. Twelve states have a state oversight body to set uniform policies but do not have statewide public defender offices. Fourteen states, including Texas, operate indigent defense systems governed by localities, such as counties, regions, or judicial districts, with little or no state oversight. The eight remaining states and the District of Columbia provide attorneys for indigent defendants in some other manner. For example, counties over a certain size might be required to have public defenders, or the state might fund public defender offices in large jurisdictions.

Spangenberg and Beeman reported that 24 states use exclusively state funds to pay for attorneys for

(continued on page 4)

The View from the Courtroom

In 1995, the State Bar of Texas' standing committee on the provision of legal services to the poor in criminal matters began a three-part survey to gather the opinions of criminal justice professionals about the indigent defense system. Prosecutors, defense attorneys, and judges gave their opinions about the process used to appoint attorneys for indigent defendants, payments to court-appointed attorneys, support services provided by courts, and the quality of representation by retained and court-appointed lawyers. The full surveys and their results can be seen on the Internet at www.uta.edu/pols/moore/indigent/survey_results.htm.

Appointment method. In varying proportions, judges reported that the following factors "always" or "usually" played a role in their decisions on appointing attorneys for indigent defendants:

- the difficulty of a case (83 percent of respondents);
- a defendant's need for specialized knowledge or skills (76 percent);
- an attorney's knowledge or experience (84 percent); and
- an attorney's reputation for moving cases, but consistent with a quality defense (48 percent).

Ten percent of judges said an attorney's reputation for moving cases, regardless of the quality of defense, always or usually played a role; 51 percent said it never did.

About 13 percent of judges reported that whether the attorney was a political supporter sometimes influenced their appointment decisions. About three-quarters of judges said this consideration never influenced their appointment of attorneys.

Compensation. Defense attorneys in the survey indicated that when they represent defendants under a court appointment, they receive on average about 30 percent of the fee they would receive if the clients had paid for their services. About two-thirds of defense attorneys said the level of compensation affects the quality of representation that indigent defendants receive.

Almost half of the judges surveyed said current reimbursement rates were sufficient to attract qualified attorneys, and 62 percent said the level of pay does not affect the quality of a court-appointed attorney's work. About three-quarters of judges said they adjusted the

fees they pay court-appointed counsel depending on the complexity of the case.

The majority of prosecutors said they believed that court-appointed attorneys and attorneys retained by clients treated their clients differently. Three-quarters of prosecutors said attorneys were less prepared to defend their indigent clients, and two-thirds said these attorneys put on a less vigorous defense of their indigent clients. Three-quarters of prosecutors said money or lack of compensation caused this variance in attorneys' performance.

Quality of representation. About 57 percent of prosecutors and 52 percent of judges responded that retained and court-appointed lawyers provided the same quality of representation, while 39 percent of prosecutors and 42 percent of judges said that retained counsel usually or always provided better representation than court-appointed counsel. In contrast, three-quarters of defense attorneys said that retained counsel usually or always provided better representation than court-appointed counsel. However, the same proportion of defense attorneys said they themselves provided the same level of representation for both court-appointed and retained clients.

A high percentage of both judges (92 percent) and prosecutors (90 percent) said sentencing decisions were similar for defendants who retained lawyers and those who used court-appointed counsel. Prosecutors said plea offers were the same for defendants who retained lawyers and those with court-appointed counsel and that judges treated both groups equally.

About 40 percent of defense attorneys said clients with retained counsel received better plea agreement offers than those with court-appointed attorneys, while 26 percent reported that clients who retained their attorneys received more favorable sentences. Still, two-thirds of defense attorneys said clients with court-appointed attorneys received similar sentences.

When asked their most preferred option among proposals that ranged from no changes to the current system, to increasing compensation levels in the court-appointed system, to instituting a statewide public defender system, both prosecutors and defense attorneys preferred to retain the court-appointed system while increasing attorney's fees, according to the survey.

(continued from page 2)

indigent defendants at the trial phase; 11 states, including Texas, use county funds; and 15 states use a combination of state and county funds. States use similar systems to provide attorneys for appeals.

Texas requirements and practices

In Texas, criminal cases generally are tried in the county in which the crime occurs. The Code of Criminal Procedure (CCP), art. 1.051 states that criminal defendants are entitled to be represented by counsel in any adversarial judicial proceeding that can result in confinement. Under art. 26.04, a court must appoint at least one attorney to defend an indigent person charged with a felony or a misdemeanor punishable by imprisonment. This means that courts must provide lawyers for indigent defendants accused of felonies and Class A and B misdemeanors, for indigent youths involved in juvenile court proceedings, for indigents being processed for some civil procedures that can result in incarceration, such as involuntary commitment to mental health facilities, and for indigents in any other criminal proceeding if the court concludes that the interests of justice require representation.

CCP, art. 15.17 requires magistrates to inform arrested persons that if they are indigent, they have a right to request the appointment of counsel. If an indigent defendant requests an attorney, the court must appoint one as soon as possible. Appointed attorneys must represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is relieved of the duties by the court and another counsel is appointed.

Courts meet these statutory and constitutional requirements in various ways. Each court runs its own program and, except for some appeals in death penalty cases, there is no statewide oversight or guidelines beyond those in the statutes. Counties ultimately pay for the appointed attorneys because counties fund the criminal courts that make the appointments.

While the vast majority of Texas courts use court-appointed counsel systems, a few use some type of public defender office, and some courts contract with private attorneys to handle indigent defense. Practices vary even from court to court within the same county. For example,

in Harris County, some courts use public defenders, while others appoint attorneys.

Texas courts also use different methods to appoint attorneys for indigent defendants. For example, judges can appoint attorneys from a list of all criminal lawyers in a jurisdiction, from a list of lawyers who have said they would like to be appointed for criminal indigents, or from a list of lawyers who meet certain educational requirements or have a certain type of experience. Travis County has a centralized office that makes about 90 percent of attorney appointments using lists that designate attorneys by their experience. Judges make the remaining appointments. In Bexar County, all lawyers except those who work in the prosecutor's office, law professors, and some others not in private practice must accept court appointments unless they pay \$500 annually to be exempt from the appointments.

Compensation. Appointed attorneys must be paid a "reasonable attorney's fee" for certain services listed in CCP, art. 26.05. These services include time spent in court on the case, reasonable and necessary time spent out of court, and preparation of an appeal. All payments must be made according to a schedule of fees adopted by the county and district criminal court judges in each county and must be paid from the general fund of the county in which the prosecution takes place. The statute also requires appointed attorneys to be reimbursed for reasonable expenses incurred with prior court approval for investigation and expert testimony. Other expenses can include interpreters, psychiatric evaluations, medical records, and court transcripts.

In most cases, the state provides no funds to pay for appointed attorneys. However, the state does contribute up to \$25,000 per case for attorneys and expenses for *habeas corpus* appeals of death sentences. This type of appeal challenges the constitutionality of a conviction (see page 7). Also, in most cases, the state pays the cost of legal services for indigent prison inmates who are accused of crimes. In cases where a conflict could arise from the use of an attorney provided to an inmate by the Board of Criminal Justice, counties pay the first \$250 of the cost of services, and the state pays the balance.

Most courts that appoint attorneys for indigent defendants reimburse these lawyers with a combination of fixed fees for handling certain duties, such as a jail visit or a day in court, and an hourly rate for work performed outside of those duties. Individual judges

Table 1
Compensation for Court-Appointed Counsel in the 10 Most Populous States, 1999
(Non-capital felonies at trial)

State	Hourly rate		Per-case maximum total
	Out of court	In court	
California	Varies. In San Francisco: \$65 for felonies and \$80 for serious or life felonies with no maximum.		Varies
Florida	Varies. In Dade County: \$40	\$50	Non-capital, non-life felonies: \$2,500; Life felonies: \$3,000
Georgia	\$45	\$60	Non-capital felonies: \$2,500; Capital felony where the death penalty is not sought: \$5,000
Illinois	\$30	\$40	\$1,250
Michigan	Varies widely		Varies
New Jersey	\$25	\$30	None
New York	\$25	\$40	\$1,200
Ohio	Varies. Average rate paid in fiscal 1997 was \$31 per hour. Public Defender Standards recommend: \$40		Public Defender Commission recommends: Aggravated murder: \$8,000 (two attorneys), \$6,000 (one attorney); Murder: \$3,000; Aggravated felony: \$2,000; Other felonies: \$1,500
Pennsylvania	Varies. As of Spring 1997, rates in Philadelphia County shifted to a per-diem basis.		None
Texas	Varies widely		Varies widely

Source: Prepared by the Spangenberg Group for the American Bar Association's Bar Information Program.

decide what rates they will pay. In most situations, even when counties or judges have a published fee schedule, judges have the discretion to alter the rates paid to court-appointed attorneys.

In 1998, the Texas Conference of Urban Counties reported that counties' overall expenses for providing defense for indigents were rising. The conference reported that the total costs for indigent legal services for eight large counties (Harris, Dallas, Bexar, Tarrant, Travis, Fort Bend, Galveston, and McLennan) had increased from \$45.2 million in 1994 to \$49.4 million in 1997, a rise of 9 percent. While most counties increased spending on indigent defense over the four years, Harris County spent slightly less in 1997 (\$11.7 million) than in 1994 (\$12.4 million). In contrast, costs for Dallas County rose almost 20 percent, and costs for McLennan County rose about 68 percent.

Fifteen states, including Texas, leave the amount of compensation for court-appointed attorneys up to a

locality, either a county, a judge, or a combination of the two, according to a September 1999 overview prepared for the American Bar Association by the Spangenberg Group, a research and consulting firm specializing in indigent criminal defense issues. Eight states and the District of Columbia have statutory reimbursement rates for court-appointed counsel; 16 states set uniform, statewide hourly rates, either through administrative bodies, courts, or public defender or indigent defense commissions; three states pay a flat fee per case; one state allows the superior court to establish rules for compensation and uses a mix of annual contracts and hourly rates; in three states, a statewide commission sets nonbinding compensation rates; and four states use a combination of methods.

Table 1 shows reimbursement rates reported for the 10 most populous states. These rates apply only when attorneys are appointed. In many jurisdictions, public defenders handle the bulk of cases involving indigent defendants.

Examples of compensation practices in Texas include:

- Dallas County's fee schedule calls for a fixed daily minimum rate of \$200 and a maximum of \$750 for a non-capital jury trial and \$50 to \$150 for a court appearance. For capital trials, the daily minimum is \$350 and the maximum is \$1,500. The hourly rate for all activities except capital appeals ranges from \$40 to \$250.
- Travis County's guidelines for felony cases call for appointed attorneys to be paid \$250 if a plea and sentence are handled in the same setting, \$400 for a non-jury trial, and \$500 for a jury trial, based on a minimum of six hours spent in court, with lower fees if less time is spent in court. Attorneys in Travis County must have court approval for compensation to be based on an hourly rate. The guidelines call for hourly rates of \$50 to \$70 for in-court time and \$40 to \$60 for out-of-court time.
- The 54th District Court in McLennan County handles felony cases and lists on its fee schedule \$200 for court-appointed attorneys if a non-capital case is dismissed after a defendant has been charged formally and \$1,200 if a capital case is dismissed after a charge. The fee schedule calls for a \$300 payment for a plea of guilty or no contest in a non-capital case and \$1,300 for the same plea in a capital case. For non-capital cases, the schedule sets minimum hourly rates of \$25 for out-of-court and \$50 for in-court work and maximum hourly rates of \$60 for out-of-court and \$100 for in-court work. For capital cases, the schedule sets a minimum of \$40 per hour for out-of-court and \$75 per hour for in-court work, and a maximum of \$60 for out-of-court and \$150 for in-court work. The court also sets daily rates for in-court work and rates for work on appeals.
- The fee schedule for four of the counties in the 33rd judicial district (Blanco, Llano, Mason, and San Saba counties) lists hourly rates of \$50 to \$60 for a maximum of six hours of out-of-court work, \$50 to \$65 for a non-capital trial with testimony, for a maximum of \$500 per day, and \$125 per hour for a capital trial with testimony, for a maximum of \$1,000 per day.
- Val Verde County reports that it pays court-appointed attorneys \$40 per hour for out-of-court work and \$50 per hour for in-court work.

A 1996 survey of criminal defense attorneys by the State Bar of Texas indicated that they charged paying clients an average hourly rate of \$136. When billing with a flat fee, the attorneys said they charged, on average, \$631 for a misdemeanor plea, \$1,706 for a misdemeanor trial, \$1,588 for a felony, non-capital plea, and \$4,605 for a felony non-capital trial.

Determining indigency. Courts are supposed to follow broad requirements in the CCP to determine whether defendants are indigent. Art. 26.04 requires courts to consider factors such as income, property owned, outstanding obligations, necessary expenses, dependents, spousal income, and whether the defendant has posted or is capable of posting bail. Also, defendants must sign a statement of their indigency. If a court finds that a defendant has financial resources that would allow the defendant to offset the costs of legal services provided, the court must require the defendant to pay the costs of the services in part or in full.

Most counties consider a defendant indigent if the person is in jail and unable to make bail, according to a survey of defense attorneys reported by researchers for the State Bar's committee on the provision of legal services to the poor.

Public defenders. The CCP explicitly authorizes some counties and judicial districts to create public defender offices. No statute prohibits other counties from using public defenders.

Each judge of a criminal district court in Tarrant County must appoint an attorney to serve as a public defender. While all Tarrant County felony courts have public defenders, judges may appoint attorneys for indigent defendants instead of using the public defender office.

The following jurisdictions listed in the CCP are authorized but not required to have a public defender office: Wichita, Webb, Colorado, Cherokee, and Tom Green counties; the 33rd district court (Blanco, Burnet, Llano, Mason, and San Saba counties); the 293rd and 365th district courts (Dimmit, Maverick, and Zavala counties); and any county with four county courts and four district courts (in general, the most populous 15 to 20 counties).

Tom Green and Cherokee counties, the 293rd and 365th judicial districts, and a portion of the 33rd judicial district (Blanco, Llano, Mason, and San Saba counties)

do not operate public defender offices despite their statutory authorization. Instead, judges in these counties appoint attorneys for indigent defendants.

Wichita, Colorado, and Webb counties operate traditional public defender offices in which salaried attorneys are paid to handle all indigent cases, unless they have a conflict of interest. In Burnet County, part of the 33rd judicial district, the county pays a private attorney an annual fee to represent all indigent defendants accused of felonies.

Also, the Harris County commissioners court is authorized to contract with specific entities to help the courts provide timely and effective assistance of counsel to indigent defendants. The county may contract with an established bar association, a nonprofit corporation, a nonprofit trust association, or any other nonprofit entity whose primary purpose is to provide timely and effective assistance of counsel for indigent defendants.

Death penalty cases. While defendants in death penalty cases have the same guarantee of counsel, a special system exists for providing representation for indigent defendants. As in all criminal cases, the trial court appoints attorneys for the original trial and direct appeal of that trial. However, during the special appellate phase called a *habeas corpus* appeal, which raises issues outside of the trial record, the convicting court appoints and pays the attorneys, and the state reimburses counties for paying attorney fees and for certain fees and investigation expenses incurred by the attorney. The state's reimbursement is capped at \$25,000 for each application for a writ of *habeas corpus*, but counties may pay the attorney more if they choose.

Issues in the debate

The debate over the current system usually centers on four broad areas: the appointment process, the competency of appointed attorneys, compensation for appointed attorneys, and the timeliness of appointments.

Critics of the system say that the appointment process is flawed because conflicts of interest can occur when elected judges appoint defense attorneys and that the system does nothing to ensure that the attorneys provided for indigent defendants are competent, compensated appropriately, or appointed in a timely fashion. The state needs some kind of oversight or

regulatory role in the appointment system to ensure that defendants throughout the state receive similar treatment and that their rights are not violated, critics say. Sen. Rodney Ellis, author of SB 247, has said that the current system places the state and counties in jeopardy of lawsuits by inmates claiming violations of constitutional rights.

Supporters of the current system say it works well and is fair and equitable despite differences among jurisdictions, and it should not be scrapped because of a few isolated problems that can be dealt with in other ways. They argue that judges are the appropriate entity to oversee the appointment of attorneys since judges are responsible for what happens in courtrooms, giving them an interest in ensuring that appointed attorneys are competent, adequately compensated, and assigned in a timely manner. The proper role for the state in the indigent defense system is to set broad guidelines in the statutes and allow courts and counties to follow those guidelines in a way that takes into account each locality's needs and capabilities, supporters say.

SB 247 provisions. SB 247 by Ellis, a proposal to change the system, was approved by the House and Senate during the 76th Legislature but was vetoed by the governor. SB 247 would have moved the responsibility for appointing attorneys for indigent defendants from courts to an appointing authority designated by county commissioners courts. It also would have authorized all counties to appoint public defenders, and it would have required attorneys to be appointed for indigent defendants within 20 days of a request.

Supporters of SB 247 say it would have given counties more options for setting up their systems to provide attorneys for indigents and would have addressed the need for an entity outside of the court to be involved. The bill would not have required that commissioners make the appointments or that the county's current system be changed, but it would have promoted local control by the counties, which ultimately pay for the appointed attorneys. Also, it would have given all counties maximum organizational flexibility by authorizing them to establish public defender offices, supporters said. The bill also would have set a deadline for attorneys to be appointed so that indigent defendants could be ensured they would have an attorney in a timely manner, they argued.

Governor Bush, in his veto message for SB 247, said the bill inappropriately would have taken appointment

authority away from judges, who are better able to assess the quality of legal representation, and would have given it to county officials. The bill would have created the potential for counties to set up a new layer of bureaucracy that could have resulted in increased backlogs and decreased court efficiency, the governor said. Also, the bill posed a danger to public safety by requiring a judge to release any defendant who had not been assigned a lawyer within 20 days of requesting one.

The House Committee on Criminal Jurisprudence studied the cost of legal services for the indigent during the 1997-98 interim and recommended to the 76th Legislature that it examine giving county commissioners the authority to create public defender offices, allowing small rural counties to create multicounty public defender offices, and requiring that defendants be told how they can exercise their right to request the appointment of counsel. The committee also noted a need for a statewide record of cases in which indigent defendants accept lesser charges or plead guilty or no contest.

Issue 1: Appointment process

Proposals to change the current system for appointing counsel for indigent defendants include:

- allowing county commissioners courts to adopt procedures and designate an authority to appoint counsel;
- giving all counties the option of establishing public defender offices and allowing counties to pool resources to fund and create regional public defender offices;
- requiring counties to report their indigent criminal defense procedures to the Office of Court Administration to allow oversight of the counties' systems; and
- requiring appointments to be made from a public list of qualified attorneys in the order that the attorneys appear on the list.

Some proposals deal specifically with concerns about attorneys appointed to defend persons accused of capital murder. These proposals include:

- creating a statewide capital litigation office to defend persons accused of capital murder;

- funding a support office to help lawyers who defend persons accused of capital murder; and
- increasing funding for the current system.

Critics of the current system say:

Judges, who are elected in partisan elections, should not directly appoint or pay lawyers for indigent defendants. At the least, this system gives the appearance that appointment decisions could be based on attorneys' relationships with judges and that political donations from lawyers could influence appointment and pay decisions. The system can lead to cronyism and ethical conflicts. There are examples in which judges appointed a small number of lawyers for a large portion of their court's cases.

The relationship between judges and defense attorneys that is created when judges make appointment decisions can result in some judges and appointed attorneys who are more concerned with moving a case through the court than with providing a vigorous defense. For example, judges might tend to appoint attorneys who do not make time-consuming court motions and who will advise defendants to enter plea bargains so that the court docket moves quickly. Abuses of the current system prove that it does not provide adequate oversight of judges' decisions.

The state or other governing bodies such as county commissioners courts should be given a stronger role in overseeing the appointment process. This would allow an entity other than individual judges, who often claim judicial immunity from being sued when abuses occur, to be held legally responsible for the system. Any entity designated to appoint attorneys would have to do so within constitutional restraints. For example, if commissioners courts were named the appointing authority, they could designate the county's judges as a whole to make the appointments, and the judges, in turn, could set up offices to do the actual appointing. If the oversight authority acted unconstitutionally, it could be sued.

All counties should be given explicit authorization to create public defender offices, which can be an effective, cost-efficient way to provide indigent representation. Public defender offices created by the counties can be more independent than public defenders appointed by judges, thereby eliminating conflicts of interest. Public defender offices can provide training and standards for

the attorneys, allowing the attorneys to develop expertise in criminal law. The offices also can help provide resources such as investigators and expert witnesses.

Supporters of the current system say:

On the whole, the current system works well, and isolated problems in individual counties should not lead the state to scrap the entire system. It could be unconstitutional for the state to give an entity other than the courts the ultimate responsibility for the indigent defense system, because the protection of defendants is a constitutional obligation of the courts. It also would be unwise to take away the appointment authority from judges, who are elected to run the judicial system and are in the best position to assess the quality of appointed lawyers. Other entities, such as county commissioners, would be too far removed from the system to make appropriate decisions about appointments. County commissioners traditionally are more concerned with other county issues such as roads and should not be involved in the daily operation of the legal system.

Allowing an entity other than the court to make appointments could result in counties setting up a new layer of bureaucracy that could create backlogs of defendants waiting for attorneys and could decrease court efficiency. Any new authority created to appoint attorneys for indigent defendants could be subject to the same criticism applied to judges who make appointments — for example, that the appointing authority appointed lawyers who would handle cases quickly at the expense of providing a vigorous defense.

The news media, election opponents, and the public provide adequate oversight of judges' appointment decisions. Judges' appointments and the contributors to their campaigns are public records that can be monitored easily, and any misconduct issues can be raised during elections or through established mechanisms for investigating judicial misconduct.

Widespread use of public defenders could create another bureaucratic hurdle for indigent defendants and could result in delays in the justice system. Indigents could receive less qualified attorneys from a public defender office than under an appointment system, since experienced lawyers might be reluctant to work as salaried public defenders. Public defenders themselves can be incompetent, or they can become overburdened with cases and the quality of their work can go down.

In addition, a public defender system could be more expensive than appointing attorneys, especially if a whole infrastructure, including offices and support personnel, had to be funded. In some of the larger urban counties, it could be prohibitively expensive to hire enough public defenders to handle thousands of cases each year. When judges use the appointment system, they have a much larger pool of attorneys to draw from than those who are hired by a public defender office. At the least, judges should retain the right to appoint attorneys because judges are in the best position to pick the right attorney for a case.

Texas traditionally has organized its criminal justice system on the local level. The state does not have a unified prosecutor system, nor should it institute a unified or regional public defender system.

Issue 2: Competency of appointed attorneys

While the Sixth Amendment guarantee to counsel has been interpreted as guaranteeing the effective assistance of counsel, in non-capital cases in Texas, no statewide standards apply to attorneys who are appointed to represent indigents. In certain appeals of death sentences, the convicting court must appoint attorneys for *habeas corpus* appeals according to rules adopted by the Court of Criminal Appeals, which must approve the appointment. Whether someone has been provided “effective” counsel is an issue that can be raised during the appeals process.

Proposals to address the issue of the competency of appointed attorneys include:

- setting statewide minimum standards;
- requiring judges to establish qualifications for appointed attorneys and then to make appointments from a list of attorneys who meet those qualifications;
- establishing regional public defender offices to handle most indigent cases and to train lawyers in defense work, ensuring a pool of competent, qualified defense lawyers; and
- requiring the state to distribute money to help counties pay the costs of indigent representation.

Critics of the current system say:

The lack of uniform, statewide standards for appointed attorneys results in some defendants being assigned incompetent attorneys, often with disastrous results for the defendant. Requiring that attorneys have certain types of training or experience and be adequately compensated would help ensure that defendants have competent counsel and would recognize that it takes special skills to represent a criminal defendant.

As of April 1998, 19 states had some type of statewide guidelines for attorney eligibility and qualifications for non-capital cases, according to the Spangenberg Group. These standards can be binding or nonbinding and can be set by statute, indigent defense oversight bodies, bar committees, or local or state associations.

Studies show that appointed lawyers often deliver a negative outcome for indigent defendants. Although statewide statistics are not available, the *Houston Chronicle* reported in October 1999 that it had studied 1,800 first-offense charges of cocaine possession and found that 21 percent of defendants who hired lawyers were sentenced to jail or prison time, compared to 53 percent of defendants with appointed lawyers. A study of Harris County cases by *Texas Lawyer* (August 28, 1995) also reported that defendants who used court-appointed attorneys were more likely to receive jail sentences than were defendants who retained attorneys and that the sentences were more severe for those with court-appointed lawyers.

The widely diverse systems for appointing attorneys result in inconsistent and sometimes incompetent representation for indigents. One recent example is the case of death-row inmate Calvin Jerold Burdine, who in 1999 was ordered retried or freed by a U.S. district judge because his court-appointed attorney often slept during the trial. This denied Burdine the effective assistance of counsel in violation of the Sixth Amendment, Judge David Hittner ruled. The attorney claimed that he was concentrating, not sleeping. Hittner ordered Burdine freed or retried within 120 days of the September 29 order. Attorney General John Cornyn has filed notice of the state's intent to appeal the order.

In 1998, the Court of Criminal Appeals denied defendant Ricky Eugene Kerr's state appeal of his death sentence even though a dissenting judge said that

allowing the execution would result in blood on the hands of the court. In his dissent, Judge Morris Overstreet wrote that Kerr was not afforded his legal right to apply for *habeas corpus* relief because his appointed lawyer filed only a perfunctory challenge that was denied. Overstreet wrote that the attorney had admitted he filed such a perfunctory appeal because he erroneously thought he was precluded from making another challenge. The attorney's error effectively denied Kerr his right to challenge his conviction or sentence, Overstreet wrote.

Another often-cited example is the case of Federico Macias, whose 1984 Texas death sentence was overturned by a federal court that said Macias had been denied his constitutional right to adequate counsel. The court said Macias' defense was paid \$11.84 an hour and that "unfortunately, the justice system got only what it paid for."

Other examples include defense lawyers who miss filing deadlines or who never meet their clients before a trial and thus cannot prepare an adequate defense.

Supporters of the current system say:

There is no need to set statewide standards for appointed attorneys because judges already monitor the attorneys' competence. Such standards would infringe on judicial discretion to decide how a case will be handled. Judges are interested in appointing competent attorneys because they do not want to have cases overturned on appeal.

It could be difficult to develop workable standards for selecting attorneys eligible to represent indigents. Setting statewide standards for appointed counsel could restrict judges inappropriately. For example, requiring membership in a criminal defense association might not ensure that a lawyer is qualified, while allowing only specialists to take these cases could be a burden in small counties. It would be relatively easy to require experience, but not so easy to set criteria for competence.

The current system allows counties the flexibility to design a system for appointing attorneys that fits the counties' circumstances. Some counties require appointed attorneys to meet educational requirements and to pass a test before being placed on a list of attorneys who will be appointed by the courts. Other counties appoint counsel for indigents using a list of all attorneys who live in the county.

The *Houston Chronicle* study and the *Texas Lawyer* analysis of Harris County cases fail to control for factors such as the type of case and the defendant's history. For example, it could be that first-time offenders with clean records and jobs retain attorneys at higher rates than do repeat offenders, or that defendants with money to hire attorneys tend to have jobs and family support systems and thus make better candidates for probation than do indigent defendants.

Issue 3: Compensation of appointed attorneys

Proposals to change the way court-appointed attorneys are compensated include:

- requiring courts to pay appointed attorneys according to a statewide minimum fee schedule for types of cases or a statewide minimum hourly rate;
- require that the amount spent on indigent defense be a fixed portion of what is spent on the prosecution of criminals or some other benchmark, and
- having the state provide at least part of the funds to pay attorneys for indigent defendants.

Critics of the current system say:

Inadequate compensation for defense attorneys can lead to inadequate representation. A 1986 study ranked Texas 39th, near the bottom in per-capita spending by states on indigent defense. Texas spends far less on indigent defense than it spends on prosecutors' offices.

The lack of statewide guidelines or rules about compensating attorneys results in a wide range of fees, which, in turn, can result in unfair compensation to attorneys from court to court and uneven representation. Courts pay hourly rates that vary widely, depending on the court, the experience of the attorney, and whether the payment is for in-court or out-of-court work. Courts also pay a wide range of fixed fees for work based on certain actions.

While some courts may have set fee schedules, judges also routinely violate those schedules and pay attorneys less. In some cases, attorneys can interpret this as a rebuke for putting up a vigorous defense or for taking a case to trial. In addition, some counties either do not reimburse or else severely restrict defense lawyers' payments to expert witnesses and investigators. An

independent administrator could be established to review attorney's charges and order payments.

Supporters of the current system say:

Local control over the fees paid to appointed attorneys is the best way to ensure that attorneys are compensated according to local standards instead of by some arbitrary statewide standard. Also, compensation does not necessarily indicate an attorney's skills. Courts often appoint experienced attorneys and pay them according to a fee schedule that is less than what those attorneys charge their paying clients. Setting statewide minimum fees for attorneys could be considered an unfunded mandate on counties.

Judges should retain authority to examine and pay attorneys amounts that differ from what an appointed attorney claims as hours worked on a case, because these hours can be inflated or unreasonable. Judges are in the best position to evaluate the work done on a case.

Issue 4: Timely appointments

No statewide rules exist for when attorneys must be appointed for indigent defendants. In September 1999, the judicial section of the State Bar adopted a resolution directing judges to work for the timely appointment of counsel for indigent defendants and advocating the appointment of a committee to study and recommend policies and procedures to accomplish that goal.

Proposals to address the timeliness of appointing attorneys for indigent defendants include:

- requiring the appointment of lawyers for indigent defendants within a specified time period (for example, within 20 days of the defendant's request, as in SB 247); and
- requiring that defendants be told how to request the appointment of counsel.

Critics of the current system say:

There should be a statewide limit on the time that an indigent defendant must wait before being appointed an attorney. The current system often causes poor defendants to languish in jail because they cannot afford to hire an attorney or post bail. Not having an attorney appointed

quickly can have many repercussions for defendants, such as the inability to challenge the amount of bail that has been set or to invoke certain rights.

While some areas, particularly large urban jurisdictions, report appointing attorneys for indigents within three days, in other areas it is not uncommon for defendants to spend weeks — sometimes even months — in jail. For example, in some counties, lawyers are not appointed until a defendant is indicted by a grand jury — a process that can take several weeks, especially in smaller counties in which grand juries may not meet often. Even in counties with public defender offices, the appointment of the public defender to represent a defendant can take weeks. Judges could avoid having to release defendants who were not provided an attorney within a proposed statutorily defined time period by simply appointing an attorney.

Supporters of the current system say:

Setting deadlines for the appointment of attorneys would restrict local discretion in making appointments and is unnecessary because attorneys in most jurisdictions are appointed within a few days. In the state's most populous counties, counsel usually is appointed within a few days. Williamson County reports that criminal defendants are taken before judges within 24 hours and that lawyers are appointed within 72 hours. Proposed remedies such as requiring the release of defendants who are not appointed counsel within a specific time could endanger the public.

There is no need to set an arbitrary deadline to appoint counsel because courts act as quickly as possible to appoint attorneys so that jails do not become overcrowded with defendants waiting for their cases to be resolved.

— by Kellie Dworaczyk

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